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In the Supreme Court of the United States

OCTOBER TERM, 1945

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

v.

WOKO, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Federal Communications Commission, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled cause on January 21, 1946, reversing an order of the Commission denying respondent's application for a renewal of its radio station license.

OPINIONS BELOW

The findings and conclusions of the Federal Communications Commission (R. 30–51) have not yet been reported. The opinion of the United

States Court of Appeals for the District of Columbia (R. 80–94) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1946 (R. 94). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Communications Act empowers the Federal Communications Commission to deny an application for renewal of a radio station license on the ground that the applicant has wilfully made false statements in applications and reports, has thus indicated that it cannot be entrusted with the responsibilities of a license, and, consequently, that renewal would not serve the public interest, convenience, and necessity.

2. Whether the court below erred in reversing the order of the Commission on the ground that the Commission is required to make findings on other issues even when, upon consideration of the evidence before it, the Commission has concluded that an applicant's character is such that he is not qualified to receive a renewal of his license.

3. Whether, even if the Commission is required to make findings on other issues, the court below improperly required it to take into considera-

tion the effect of a denial of an application for renewal of a license upon the value of the property used in the operation of the station.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. 151, *et seq.* (hereinafter referred to as the "Communications Act"), are printed in the Appendix, *infra,* pp. 18–24.

STATEMENT

On October 1, 1942, respondent, WOKO, Incorporated, filed with the Federal Communications Commission an application for a renewal of its license for the operation of radio station WOKO at Albany, New York (R. 9–21); this license had been renewed periodically since a date prior to November 30, 1930 (R. 32). The Commission was unable, upon examination of the application, to determine that public interest, convenience, or necessity would be served by a renewal of respondent's license. Accordingly, it designated the application for hearing upon the following issues (R. 24):

> 1. To determine whether the representations and statements made to the Commission or its predecessor, the Federal Radio Commission, by the licensee, its officers, directors, stockholders, or agents, with respect to the ownership or transfer of, subscription to, or considera-

tion paid for the stock of WOKO, Inc., truly and accurately reflect the facts.

2. To determine all the circumstances and conditions under which the stock of WOKO, Inc., has been issued, transferred, or assigned.

3. To determine whether or not the applicant is qualified to continue the operation of station WOKO.

4. To determine whether, in view of the facts adduced under the foregoing issues, public interest, convenience and necessity would be served by a grant of this application.

Hearings were held in July, August, and September, 1943, before a presiding officer designated by the Commission. The evidence at the hearing disclosed that, since 1930, more than twenty-five applications either for renewal or modification of license had been filed by respondent with the Commission or its predecessor, the Federal Radio Commission. Each application form requested information concerning all stockholders owning and/or voting 10% or more of the applicant's stock and the percentage of stock held by each. The Commission found that, since 1930, Sam Pickard has been the legal or beneficial owner of 24% of the stock of respondent; that when the stock was acquired, Pickard, a former member of the Federal Radio Commission, was a vice president of Columbia Broadcasting System in charge of station relations; that Pickard had acquired the

stock in consideration for his procuring for respondent an affiliation contract with Columbia Broadcasting System; that Pickard had requested respondent not to disclose his stock interest; that in all applications filed by respondent with the Commission and its predecessor since 1930, no disclosure had been made of Pickard's legal or beneficial ownership of 24% of respondent's stock; and that respondent had wilfully misrepresented and concealed the existence of Pickard's stock interest in violation of Section 10 of the Radio Act of 1927, Section 308 (b) of the Communications Act of 1934, and the applicable rules and regulations of both Commissions. (R. 30–47.)

On the basis of these and related subsidiary facts disclosed at the hearing, the Commission concluded that respondent could not be entrusted with the responsibilities of a station licensee and that a grant of its application for renewal of license would not serve the public interest, convenience, or necessity (R. 47–51). Accordingly, an order was entered denying the application for renewal of the license (R. 63–64).

On May 21, 1945, respondent took an appeal from the order of the Commission denying its application for renewal of license to the United States Court of Appeals for the District of Columbia. On January 21, 1946, a divided court reversed the order of the Commission. Justice Wilbur K. Miller delivered the opinion of the

court, in which Justice Prettyman concurred (R. 80–93). Chief Justice Groner dissented in a separate opinion (R. 93–94).

The court below concluded that the Commission "does not have the power * * * to refuse to issue a renewal license because of misstatements of the licensee, unless those misstatements are of such moment as to outweigh all competing considerations, and logically and rationally to give rise to the conclusion that the public interest, convenience, and necessity would not be served were the license renewed" (R. 89). On this premise, the court below held that the Commission's denial was not based on such "compelling reasons" since the Commission had failed to consider and make findings on "the quality of appellant's service in the past, and its equipment for good service in the future" or "the value of the property which its decision would render almost valueless" (R. 81). The court also observed that "it does not appear * * * that the concealment influenced or induced the Commission's action in granting license renewals heretofore, nor that the Commission's past decisions which granted renewals would have been different had the identity not been concealed" (R. 92). The court held further, in effect, that the Commission was precluded from penalizing the respondent by refusing to renew a license because of false statements made by it, since Sections 501 and 502 provided penalties for any violation of the

provisions of the Act or of any rule or regulation of the Commission (R. 92).

Chief Justice Groner dissented in a separate opinion (R. 93–94). He was of the view that it was "obvious on the grounds of public policy" that the Commission had authority under the Communications Act to refuse to renew the license of an applicant "for repeated false swearing in statements of fact required to be filed by the Commission's rules and regulations." Pointing out that the record shows that respondent deliberately misled the Commission, he concluded that the order was within the discretion of the Commission. He observed that "what, if anything, would have happened if the truth had been disclosed is, in my view, not material" (R. 93).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Commission does not have authority, under the Communications Act of 1934, to deny an application for renewal of license solely on the ground that the applicant is not qualified because it has deliberately made false statements to the Commission.

2. In substituting its own judgment and discretion for that of the Commission in holding that the Commission's findings were not sufficient to support its conclusion that respondent was not qualified to continue as a station licensee.

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3. In resting its decision upon its own findings on issues on which the Commission made no findings, and found it unnecessary to do so.

4. In finding that two of respondent's stockholders had no knowledge of the misrepresentations made to the Commission, despite the Commission's express finding that it could draw no such inference from the evidence.

5. In holding that the Commission is required to take into consideration the effect of a denial of an application for renewal upon the value of the property used in the station's operation.

6. In holding, in effect, that, because Sections 501 and 502 provide penalties for violation of the provisions of the Communications Act of 1934 or of any rule or regulation of the Commission, the Commission is precluded from denying a renewal of a license because of false statements made by the applicant.

7. In failing to affirm the Commission's order.

REASONS FOR GRANTING THE WRIT

1. The opinion of the court below imposes limitations on the Commission's licensing authority which are clearly in conflict with the provisions of the Communications Act and the decisions of this Court and which would seriously impair performance of the licensing and regulatory functions entrusted to the Commission. And since the court below has, under Section 402 (b) of the Act, exclusive jurisdiction of appeals from Com-

mission decisions granting or denying station licenses or renewals of licenses, it is of especial importance for the proper administration of the Act that any serious error in defining the Commission's licensing powers be corrected by this Court.

The decision of the court below would preclude the Commission from denying an application for renewal of license on the ground that the applicant was not qualified, even when evidence adduced at a hearing enabled the Commission to conclude that his character was such that he could not be entrusted with the duties and responsibilities of a licensee. The same result must also follow in the case of an original application, since Section 307 (d) of the Act provides that the "action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications."

The consequence of the Court of Appeals' holding is that the Commission, in passing on renewal applications, will be required to consider other factors such as past program service rendered by an applicant and the adverse effect which a denial of such renewal would have on the value of property used by the applicant for broadcasting purposes, and further that the

Commission may refuse to renew only where considerations relating to the character of the applicant "are of such moment as to outweigh all competing considerations" (R. 89). But nothing in the Act warrants this interpretation. Indeed, the provisions of the Act itself and the holdings of this Court and the court below in other cases involving the licensing provisions of the Act make it clear that this interpretation is untenable. Section 308 (b) of the Act expressly provides that the character of an applicant is a material qualification for the granting of a license or a renewal. The Act does not require the Commission to consider other grounds when it is satisfied that one ground is a sufficient basis for a denial of a license. Nor can the requirement that the Commission's licensing powers be exercised in the light of the criterion of the public interest, convenience and necessity be so construed. This Court has passed on that very issue in the case of *National Broadcasting Company* v. *United States,* 319 U. S. 190. In that case, the Court held that the Commission could deny an application for renewal of a license where it found that an applicant's network affiliation contract contained features which the Commission found were not in the public interest. Similarly, the Court of Appeals itself has held that where the Commission finds that one ground is a sufficient basis for the denial of a license, it need not consider others. *Simmons* v. *Federal*

Communications Commission, 145 F. 2d 578 (App. D. C.). See also, *Greater Kampeska Radio Corp.* v. *Federal Communications Commission*, 108 F. 2d 5 (App. D. C.).

2. In holding that the findings of the Commission do not support its conclusion that respondent is not qualified to receive a renewal of license, the court below has clearly overstepped the boundary between the judicial and the administrative function, and has substituted its own judgment for that of the Commission on a matter entrusted to the discretion of the Commission by the Communications Act.

As shown above, the Act does not forbid the Commission to deny a license on some single ground; it simply provides (Section 402 (e)) that Commission action is subject to reversal if "it shall clearly appear that the findings of the Commission are arbitrary or capricious." But the Commission's determination that respondent is unqualified because of its continued concealments and misrepresentations cannot be said to be so clearly arbitrary and capricious as to warrant reversal by the reviewing court. On the contrary, consideration of the undisputed facts in this case and the obvious relevance of good character to the performance of a licensee's duties both to the public and to the Commission demonstrate the correctness of the Commission's action.

It is reasonable for the Commission to make the determination that good character is an essential qualification of a radio station licensee. As has been pointed out, Section 308 of the Act expressly so provides, and it can hardly be disputed that veracity and integrity are indispensable elements of good character. That section also makes it clear that the information relating to character and other qualifications which is filed with the Commission by the applicant is designed for the very purpose of assisting the Commission in determining whether or not an application should be granted or denied or a license revoked. In addition, Section 312 (a) expressly provides that a license may be revoked for false statements in either an application or any other disclosure required by the Commission under Section 308 of the Act. The suggestion, in the opinion of the court below, that the Commission would be acting arbitrarily if it denied or revoked a license because of false statements, however trivial and inconsequential (R. 89), has no pertinence to the present case. For the wilful concealment over a twelve-year period of a 24% interest in respondent, acquired by an officer of a network organization, as consideration for doing what he was employed by the network to do, could not reasonably be characterized as trivial or inconsequential. The Commission, in the exercise of its discretion under the statute, has de-

termined that these false statements are of consequence and that respondent's past conduct reveals that it is not qualified to continue as a station licensee (R. 47–51).

It is evident that the Commission can properly exercise its licensing and other functions only if it receives adequate and truthful information from applicants and licensees. There are more than 900 standard broadcast stations presently licensed by the Commission, and in the near future there will be hundreds of television stations and several thousands of frequency modulation stations. Licenses for all of these stations have been or will be authorized to a great extent upon the basis of a showing made in the applications. Renewals are granted on the same basis. If a detailed investigation were required to determine the accuracy of the representations contained in each of the thousands of applications received annually, an intolerable burden would be imposed upon the Commission and would seriously impede, if not prevent, the normal operations of the Commission.

Under these circumstances, it can hardly be said that the refusal to renew the license of an applicant who, over a period of twelve years, wilfully filed false and misleading statements with the Commission is arbitrary or capricious. Since this determination is within the scope of the Commission's statutory power and represents a rea-

sonable exercise of the Commission's discretion, the court below, in coming to a contrary conclusion, has improperly substituted its discretion for that of the Commission. Indeed, the opinion of the court below, on its face, reveals the extent to which it has overstepped the proper boundary of its judicial competence. Thus, although the court itself expressly points out in its opinion that the Commission made no findings with respect to respondent's program service, the court goes on to make its own findings of fact on that subject. At one point it speaks of the "reasonably satisfactory" service rendered by respondent (R. 87), at another, of its "adequate and satisfactory" service (R. 93), and, at yet another, of "the high mechanical, scientific and artistic standards maintained by the station" (R. 93). The court criticizes the Commission's alleged failure to take into consideration the innocence of respondent's stockholders other than the one who prepared and signed the applications and reports involved (R. 87), despite the Commission's express finding that it was unable to conclude that those stockholders had no knowledge of the facts (R. 49–50).

These are but details which emphasize the extent to which the court below has exceeded the scope of its judicial competence and has invaded the sphere of administrative discretion, contrary

to the repeated admonitions of this Court. See *Rochester Telephone Company* v. *United States*, 307 U. S. 125, 146. See also, *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 144–145.

3. In holding that the Commission should have taken into consideration the effect of the denial of an application for renewal of license upon the value of the property used in the operation of the respondent's station, the court below, while protesting the contrary, has, in effect, attempted to create property rights in a license. But the suggestion of the court below that the Commission's discretion in the exercise of its statutory powers is limited because of the existence of substantial investments ignores express provisions of the Act. For the existence of such property rights in a license is expressly negatived by the provisions of Sections 301, 304, 307 (d) and 309 (b) of the Communications Act. Indeed the limited nature of the rights conferred by a license is emphasized by Section 304 which makes it clear that a licensee can acquire no right to the use of a frequency paramount to the regulatory power of Congress, which, under the Communications Act, has been delegated to the Commission. See *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 475, and *Ashbacker Radio Corporation* v. *Federal Communications Commission*, No. 65, this Term, decided December 3, 1945.

4. In its opinion, the court below states that the denial of a renewal because of applicant's concealments and misrepresentations cannot be justified as a penalty for making false statements. This statement lends no support to its decision. For, clearly, a refusal to renew a license does not constitute a penalty in the same sense as the imposition of a fine or imprisonment. To characterize as a penalty the withholding of a valuable privilege by refusal to renew a license because of past conduct, which may also be punishable under other provisions of law, would be entirely destructive of administrative discretion to consider such conduct when it is relevant to an applicant's qualifications to be a licensee. That very issue was considered in the case of *National Broadcasting Company* v. *United States*, 319 U. S. 190, 222–223, in which this court held that the fact that conduct of a licensee may be violative of and punishable under the provisions of the anti-trust laws, does not bar the Commission from considering such conduct in a licensing proceeding when it is relevant to the statutory criterion of the public interest, convenience and necessity.

5. The holding of the court below not only seriously impairs the licensing powers of the Commission under the provisions of the Communications Act, but is also likely to have an equally restrictive effect upon the licensing powers of other federal agencies. The rationale of the opinion is equally applicable to every situation in

which the good character of an applicant is deemed a necessary qualification for the grant of a license. Other licensing and regulatory agencies must, as in the case of the Commission, be able to rely upon the correctness and completeness of the information furnished by applicants and licensees. Therefore, the major issues presented by the court's decision are of general importance in the field of federal administrative law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

ROSEL H. HYDE,
General Counsel,
Federal Communications Commission.

MARCH 1946.

APPENDIX

Communications Act of 1934, c. 652, 48 Stat. 1064, as amended May 20, 1937, c. 229, 50 Stat. 189, 47 U. S. C. 151, *et seq.*:

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communica-

tions, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * *

SEC. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

* * * * *

SEC. 307. (d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a

license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

* * * * *

SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: *Provided, however,* That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided further,* That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the

term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

* * * * *

SEC. 309. (b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

* * * * *

SEC. 310. (b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full

information, decide that said transfer is in the public interest, and shall give its consent in writing.

* * * * * *

SEC. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

* * * * * *

SEC. 402. (e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a

judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

* * * * * *

SEC. 501. Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

SEC. 502. Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this

Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

U. S. GOVERNMENT PRINTING OFFICE: 1934